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PP v. RAMESH RAJARATNAM

COURT OF APPEAL, PUTRAJAYA
VAZEER ALAM MYDIN MEERA JCA
AHMAD ZAIDI IBRAHIM JCA
WONG KIAN KHEONG JCA
B [CRIMINAL APPEAL NO: W-09-165-05-2021]
16 AUGUST 2024

Abstract – *(i) An appellate criminal court cannot set aside a trial court's decision solely on the ground that the trial court's grounds of decision contain errors/omissions, without considering the merits of the appeal. The appellate court has a judicial duty to consider the merits of the appeal, even if the trial court's grounds of decision are flawed. The fulfilment of both the appellate court's judicial duties, under ss. 316 and 422(a) of the Criminal Procedure Code, is essential for the administration of criminal justice; (ii) Judicial copying and plagiarism are grounds for appeal, as they violate the principles of impartiality and fairness.*

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CRIMINAL PROCEDURE: *Judgment – Errors/omission – Accused person convicted by Sessions Court for three charges – Offence of insider trading under s. 188(2)(a) of Capital Markets and Services Act 2007 – Appeal to High Court – High Court found Sessions Court's grounds of decision complete reproduction of prosecution's written submissions – Sessions Court did not conduct any meaningful analysis or scrutiny of evidence adduced at trial – High Court acquitted and discharged accused person of three charges based on errors/omission in trial court's grounds of decision without dealing with merits of accused's appeal with regard to three charges – Whether appellate criminal court can set aside trial court's decision without any consideration of merits of appeal solely on ground that trial court's grounds of decision contained errors/omission – Whether there was judicial copying or judicial plagiarism – Whether errors/omission in trial court's grounds of decision can ipso facto deprive accused person of constitutional right to fair trial under art. 5(1) of Federal Constitution – Whether there were authorities that provided that breaches of rights to trial and appeal in itself allows High Court to allow appeal against trial court's decision – Criminal Procedure Code, ss. 173(f), (m), 180, 182A, 316 & 422*

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In the Sessions Court, the Public Prosecutor had filed three charges of insider trading offences against the appellant ('accused'), under s. 188(2)(a) of the Capital Markets and Services Act 2007. The accused was convicted of the three charges and sentenced as per the following: (i) five years' imprisonment for each of the charges, ordered to run concurrently; and (ii) fine of RM3 million, in default three years imprisonment, for each of the three charges ('Sessions Court's decision'). The accused appealed to the High Court against

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the Sessions Court's decision and the appeal was allowed. The accused was accordingly acquitted and discharged of the three charges. It was the Judicial Commissioner's ('JC') opinion that: (i) the Sessions Court Judge ('SCJ') went beyond a non-speaking judgment because the Sessions Court's grounds of decision was a complete reproduction of the prosecution's written submissions and did not conduct any meaningful analysis or scrutiny of the evidence adduced at the trial; (ii) the SCJ's wholesale copying of the prosecution's written submissions, without addressing his mind independently and impartially to any of the evidence available before him had caused great prejudice to the accused and constituted a ground of appeal; and (iii) the accused had three rights, namely a right to a trial and two rights of appeal against the trial court's decision ('three rights'). The SCJ's wholesale copying of the prosecution's written submissions had deprived the accused of these three rights. In allowing the appeal, the JC did not deal with the merits of the accused's appeal with regard to the three charges. Hence, the present appeal by the prosecution. The issues that arose were: (i) whether an appellate criminal court can set aside a trial court's decision, without any consideration of the merits of the appeal, solely on the ground that the trial court's grounds of decision: (a) copied *verbatim* the written submission of one party only ('judicial copying'); (b) did not acknowledge the fact that the contents of the trial court's grounds of decision were based word for word on one party's written submission only ('judicial plagiarism'); (c) did not refer at all to the written submissions of the opposing party; (d) did not identify the factual and legal issues which arose in the case; (e) did not conduct any independent assessment of the evidence adduced at the trial; (f) did not analyse the written and oral submissions of counsel for the prosecution and defence; (g) did not contain any reason or reasoning for the trial court's decision; and (h) showed that the trial judge had acted mechanically and did not apply his/her judicial mind to the case in question ('errors/omission in the trial court's grounds of decision'); (ii) could the errors/omission in the trial court's grounds of decision *ipso facto* deprive the accused person of his/her constitutional right to a fair trial under art. 5(1) of the Federal Constitution ('FC'); and (iii) whether written laws and/or case laws provided that a breach of the three rights in itself allowed the High Court to allow an appeal against a trial court's decision.

Held (allowing appeal and making orders as per para. [45] of the judgment)

Per Wong Kian Heong JCA delivering the judgment of the court:

(1) By virtue of ss. 173(f), (m), 180, 182A, 316 and 422 of the Criminal Procedure Code ('CPC') ('relevant CPC provisions'), a subordinate court and the High Court can only acquit and convict an accused person after considering the merits of the case in question. The High Court, as an appellate court, cannot decide an appeal solely on the errors/omission in the trial court's grounds of decision, without considering the merits of the appeal. The High Court has a judicial duty under s. 316

of the CPC to consider the merits of the appeal. The errors/omission in the trial court's grounds of decision constituted 'errors' and/or 'omission' in the judgment of the trial court, as understood in s. 422(a) of the CPC. Hence, the High Court was duty-bound, as an appellate court, to consider whether the errors/omission in the trial court's grounds of decision had caused a failure of justice in the case at hand. The fulfilment of both the High Court's judicial duties under ss. 316 and 422(a) of the CPC is essential in the administration of criminal justice. If otherwise, an accused person may be wrongly acquitted or erroneously convicted on an appeal to the High Court against a lower court's decision. Further, an appeal to the High Court against a subordinate court's decision after a trial is a continuation of the trial by way of rehearing and despite the errors/omission in the trial court's grounds of decision, the High Court is duty-bound to consider the merits of the appeal. (paras 15, 19 & 24)

(2) With regard to the errors/omission in the trial court's grounds of decision, (i) the first rule of natural justice requires all judges to be impartial and free from bias against any party as a matter of fact and as perceived objectively by a 'fair-minded and informed observer' (*Halliburton Co v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd) & Ors (International Court of Arbitration of the International Chamber of Commerce & Others Intervening*); (ii) judicial copying gave rise to the perception by a 'fair minded and informed observer' that the trial court had not been independent and had been biased in favour of the party whose written submissions had been copied wholesale by the trial court against the other party. In other words, the first rule of natural justice had been breached when there was judicial copying; and (iii) judicial plagiarism indicated intellectual dishonesty and showed that the court had acted mechanically in making its decision without any independent assessment of the evidence and submissions of the parties. (para 23)

(3) *Yahya Hussein Mohsen Abdulrab v. PP* ('*Yahya Hussein*') was relied on by the defence to argue that the accused's constitutional right to a fair trial in the Sessions Court, under art. 5(1) of the FC, had been effectively negated as the trial process in the Sessions Court was an absolute nullity. Firstly, *Yahya Hussein* concerned an accused person's deprivation of his constitutional right to a fair trial under art. 5(1) of the FC because of the 'flagrant incompetence' of the accused person's trial defence counsel. In *Yahya Hussein*, the Federal Court did not discuss the issue of the effect of the errors/omission in the trial court's grounds of decision. Further, the two Federal Court judgments in *Ganapathy Rengasamy v. PP* ('*Ganapathy*') and *Ahmad Najib Aris v. PP* ('*Ahmad Najib*') decided on the effect of a non-speaking judgment. Until the Federal Court's decision in *Ganapathy* and *Ahmad Najib* have been overruled by the Federal Court,

from the viewpoint of the doctrine of *stare decisis*, the Court of Appeal, the High Court and all lower courts are bound by *Ganapathy* and *Ahmad Najib*. (paras 32 & 33)

(4) The FC, the Courts of Judicature Act 1964 and the CPC do not provide, either expressly or by necessary implication that a breach of the three rights *ipso facto* entitles an accused person to be acquitted and discharged of a criminal charge. In view of the applicability of the relevant CPC provisions in this appeal, civil cases, such as *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* and *Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co Sdn Bhd & Ors* relied on by the JC, could not be referred to, either in support of this appeal or otherwise. (paras 9 & 36)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 FC ***(refd)***
Balasingham v. PP [1959] CLJU 8; [1959] 1 LNS 8 HC ***(refd)***
Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co Sdn Bhd & Ors [1999] 6 CLJ 1 HC ***(refd)***
Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak [2010] 7 CLJ 808 CA ***(refd)***
Chukwudi Okonkwo v. PP [2018] CLJU 131; [2018] 1 LNS 131 CA ***(refd)***
Cojocaru v. British Columbia Women's Hospital And Health Centre [2013] 2 SCR 357 ***(refd)***
Cojocaru (Guardian Ad Litem) v. British Columbia Women's Hospital And Health Centre & Anor [2011] BCCA 192 ***(refd)***
Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal [2013] 4 CLJ 901 FC ***(refd)***
Deepanraj Subramanian v. PP [2015] 3 CLJ 439 CA ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Halliburton Co v. Chubb Bermuda Insurance Ltd (Formerly Known As Ace Bermuda Insurance Ltd) & Ors (International Court Of Arbitration Of The International Chamber Of Commerce & Others Intervening) [2020] 3 WLR 1474 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***
Lim Chee Huat v. PP [2019] 5 SLR 433 ***(refd)***
Mathnasium Center Licensing, LLC v. Chang Chi Hung [2021] 2 HKC 552 ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd [2002] 1 CLJ 645 FC ***(refd)***
Mohamed Mokhtar v. PP [1971] CLJU 84; [1971] 1 LNS 84 HC ***(refd)***
Mohd Nazri Ismail v. PP [2014] 9 CLJ 953 CA ***(refd)***
Ng Shek Wai v. Hong Kong Institute Of Certified Public Accountants [2021] HKCU 6184 ***(refd)***
Nina Kung v. Wong Din Shin [2005] HCCU 1254 ***(refd)***
PP v. Letchumanan Suppiah [2009] 5 CLJ 652 FC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
R v. Sang [1980] AC 402 ***(refd)***
Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***
Rengarajan Thangavelu v. PP [2015] 1 CLJ 993 CA ***(refd)***
Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd [2020] 4 CLJ 811 FC ***(refd)***
Shenzhen Zhaotian Investments Co Ltd v. Henderson Land Development Co Ltd & Anor [2015] HKCU 522 ***(refd)***

A *Sorger v. Bank Of Nova Scotia 160 DLR (4th) 66* ***(refd)***
Tetuan Khana & Co v. Saling Lau Bee Chiang & Other Appeals [2019] 3 CLJ 1 CA ***(refd)***
Wong To Yick Wood Lock Ointment Ltd v. Singapore Medicine Co (A Firm) & Ors [2023] 5 HKC 126 ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(refd)***
Yue Chi Kin v. PP [2020] 7 CLJ 224 HC ***(refd)***

B **Legislation referred to:**
Capital Markets and Services Act 2007, s. 188(2)(a), (4)
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, ss. 5, 173(f)(i), (ii), (m)(ii), (iii), 180(2), 182A(2), (3), 307(3), 316(a), (b), 422(a)
C Federal Constitution, art. 5(1)
Rules of the High Court 1980, O. 14 r. 11

For the prosecution - Mohd Hafiz Mohd Yusoff & Hashley Tajudin; DPPs Low Wen Zhen & Daniel Ariff Tung; Security Commission
For the respondent - Gurdial Singh Nijar, Preakas Sampunathan, Abraham Au Tian Hui
D *& Miguel Jude Sequerah; M/s Preakas & Partners*

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Appeal No: WA-42SC-2-09-2019 (overruled).]

Reported by Lina E

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JUDGMENT

Wong Kian Kheong JCA:

Introduction

F **[1]** This appeal concerns:

(i) a criminal trial judge who, after the completion of a trial, convicted and sentenced an accused person with regard to three charges;

(ii) the trial judge's "grounds of decision" (GD) (as understood in s. 307(3) of the Criminal Procedure Code (CPC)):
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(a) reproduced *verbatim* the following two written submissions of the prosecution (prosecution's two written submissions) (save for seven paragraphs in the prosecution's two written submissions) (seven paragraphs (prosecution's two written submissions))):

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(1) the prosecution's written submission after the close of the prosecution case; and

(2) the prosecution's written reply to the accused person's written submission after the close of the defence case;

I (b) did not acknowledge the fact that the contents of the GD (except for the seven paragraphs (prosecution's two written submissions)) were based on the prosecution's two written submissions;

(c) did not refer to, let alone discuss, any part of the written submissions of the defence counsel;

(d) did not identify the factual and legal issues which arose in the case;

(e) did not conduct any independent assessment of the evidence adduced at the trial;

(f) did not analyse the written and oral submissions of learned counsel for the prosecution and defence;

(g) did not contain any reason or reasoning for the trial court's decision; and

(h) showed that the trial judge had acted mechanically and did not apply his judicial mind to the case at hand; and

(iii) the High Court (HC):

(a) allowed the appeal of the accused person;

(b) set aside the conviction and sentence imposed by the trial court on the accused person; and

(c) acquitted and discharged the accused person of the three charges

solely on the grounds stated in the above sub-paras. (ii)(a) to (h) without considering the merits of the accused person's appeal to the HC against the trial court's conviction and sentence.

Background

[2] We shall refer to parties as they were in the Sessions Court (SC).

[3] In the SC, the Public Prosecutor (PP) filed three charges of insider trading offences (three charges) against the abovenamed accused person (accused). The three charges concerned offences under s. 188(2)(a) of the Capital Markets and Services Act 2007 (CMSA) which were punishable pursuant to s. 188(4) of the CMSA.

[4] We reproduce below the three charges:

(i) the first charge (first charge):

> That you on 11 January 2010 at Bursa Malaysia Securities Berhad (Company No. 635998-W), Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, disposed 5,000,000 units of Malaysian Merchant Marine Berhad shares (Company No. 259253-X) ("the said shares") held in your Central Depository System account bearing number 058-003-003684602, while in the possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said shares, such information being the proposed downgrade by Malaysian

A Rating Corporation Berhad (MARC) of its credit rating on Malaysian Merchant Marine Berhad's RM120 million Al-Bithaman Ajil Islamic Debt Securities (BaIDS) from A(-1D) to BB(+1D), and you ought reasonably to have known that such information was not generally available and you have committed an offence under section 188(2)(a) [CMSA] and punishable under s. 188(4) [CMSA];

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(ii) the second charge (second charge):

That you on 10 February 2010 at Bursa Malaysia Securities Berhad (Company No. 635998-W), Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, disposed

C 201,300 units of Malaysian Merchant Marine Berhad shares (Company No. 259253-X) ("the said shares") held in your Central Depository System account bearing number 058-003-003684602, while in the possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said

D shares, such information being that Malaysian Merchant Marine Berhad will be classified as an affected listed issuer pursuant to the Practice Note 17 (PN17) of the Main Market Listing Requirements of Bursa Malaysia Securities Berhad, and you ought reasonably to have known that such information was not generally available and you have committed an offence under section 188(2)(a) [CMSA] and punishable

E under s 188(4) [CMSA]; and

(iii) the third charge (third charge):

That you on 22 February 2010 at Bursa Malaysia Securities Berhad (Company No. 635998-W), Exchange Square, Bukit Kewangan, 50200 Kuala Lumpur in the Federal Territory of Kuala Lumpur, disposed

F 4,999,500 units of Malaysian Merchant Marine Berhad shares (Company No. 259253-X) ("the said shares") held in your Central Depository System account bearing number 058-003-003684602, while in the possession of information that was not generally available which on becoming generally available a reasonable person would expect it to have a material effect on the price or the value of the said

G shares, such information being that Malaysian Merchant Marine Berhad will be classified as an affected listed issuer pursuant to the Practice Note 17 (PN17) of the Main Market Listing Requirements of Bursa Malaysia Securities Berhad, and you ought reasonably to have known that such information was not generally available and you have committed an offence under section 188(2)(a) [CMSA] and punishable

H under s. 188(4) [CMSA].

[5] The three charges were tried together in the SC (trial). At the trial:

(i) the prosecution called 16 witnesses;

I (ii) after the close of the prosecution's case, the learned SC Judge (SCJ) call for the defence of the accused in respect of the three charges;

(iii) the accused testified in support of his defence and called five witnesses;

(iv) both the prosecution and defence tendered written submissions to the learned SCJ; and

(v) the SC convicted the accused of the three charges and sentenced the accused as follows:

(a) the accused was sentenced to five years imprisonment for each of the three charges. All the imprisonment sentences were ordered by the learned SCJ to run concurrently; and

(b) the accused shall pay a fine of RM3,000,000 for each of the three charges (three years imprisonment in default of payment of the fine for each of the three charges).

(SC's decision).

[6] The accused appealed to the HC against the SC's decision (accused's appeal).

[7] With regard to the accused's appeal:

(i) the learned Judicial Commissioner (JC), as he then was, allowed the accused's appeal;

(ii) the accused was acquitted and discharged of the three charges;

(iii) the SC's decision was set aside; and

(iv) all the fines paid by the accused were ordered by the HC to be refunded to the accused.

(HC's decision).

[8] An appeal to the Court of Appeal (CA) was lodged by the PP against the HC's decision (this appeal).

Reasons For HC's Decision

[9] According to the GD of the learned JC (HC's GD), among others:

(i) the learned SCJ's GD (SC's GD) went "beyond a non-speaking judgment" because the SC's GD was a "complete reproduction" of the prosecution's written submissions – para. 16 HC's GD;

(ii) the SC's GD did not conduct "any meaningful analysis or scrutiny of the evidence adduced" at the trial – para. 17 HC's GD;

(iii) in para. 25 HC's GD, the learned JC relied on, among others, the decision of the CA in *Mohd Nazri Ismail v. PP* [2014] 9 CLJ 953; [2015] 1 MLJ 319;

(iv) the learned SCJ's wholesale copying of the prosecution's written submissions "without addressing his mind independently and impartially to any of the evidence available before him" had caused "great prejudice" to the accused and constituted a ground of appeal – para. 26 HC's GD;

(v) the HC had followed the judgment of the Federal Court in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351 – para. 26 HC's GD;

(vi) the accused had three rights, namely, a right to a trial and two rights of appeal against the trial court's decision (three rights (one trial + two appeals)). The learned SCJ's wholesale copying of the prosecution's written submissions had deprived the accused of his three rights (one trial + two appeals) – para. 28 HC's GD. In this regard, the learned JC had relied on the following three cases in paras. 29 to 31 HC's GD:

(a) the judgment of Mohtar Abdullah FCJ in the Federal Court in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra Malaysia Bhd* [2002] 1 CLJ 645; [2002] 1 MLJ 385;

(b) the decision of Suriyadi Halim Omar J (as he then was) in the HC case of *Bank Bumiputra Malaysia Bhd v. Aik Lee Feedmill Co Sdn Bhd & Ors* [1999] 6 CLJ 1; [1999] 1 MLJ 529 (*Aik Lee Feedmill*); and

(c) the judgment of Hashim Yusoff FCJ in the Federal Court case of *PP v. Letchumanan Suppiah* [2009] 5 CLJ 652; [2009] 5 MLJ 597; and

(vii) according to paras. 32 and 33 HC's GD, the accused's appeal was allowed because the right of the accused to a fair and just trial had been "greatly prejudiced".

[10] The learned JC did not deal with the merits of the accused's appeal with regard to the three charges (merits (accused's appeal)).

Hearing Of This Appeal

[11] When this appeal was heard in the CA on 11 December 2023, learned Deputy Public Prosecutor (DPP) informed the CA that the PP had decided to proceed with this appeal with regard to the first charge only. The PP had exercised his discretion not to proceed with this appeal against the accused in respect of the second and third charges.

Submissions By Parties

[12] In support of this appeal, learned DPP, Encik Mohd Hafiz bin Mohd Yusoff, had advanced the following contentions, among others:

(i) a substantial reproduction of the prosecution's written submissions in the SC's GD was not in itself a ground for the HC to reverse the SC's decision without any consideration of the merits (accused's appeal). Reliance was placed by learned DPP on the following cases:

(a) four cases decided in Malaysia, namely:

(1) *Mohd Nazri Ismail*;

(2) the judgment of Yeoh Wee Siam JCA in the CA case of *Tetuan Khana & Co v. Saling Lau Bee Chiang & Other Appeals* [2019] 3 CLJ 1; [2019] 3 MLJ 189;

(3) the decision of Abdull Hamid Embong JCA (as he then was) in the CA in *Celcom (Malaysia) Bhd v. Mohd Shuaib Ishak* [2010] 7 CLJ 808; [2011] 3 MLJ 636; and

(4) the judgment of the Federal Court delivered by Arifin Zakaria CJ in *Dato' See Teow Chuan & Ors v. Ooi Woon Chee & Ors And Another Appeal* [2013] 4 CLJ 901; [2013] 4 MLJ 351;

(b) the judgment of the Supreme Court of Canada in *Cojocaru v. British Columbia Women's Hospital And Health Centre* [2013] 2 SCR 357;

(c) the following three cases from the CA of Hong Kong:

(1) *Shenzhen Zhaotian Investments Co Ltd v. Henderson Land Development Co Ltd & Anor* [2015] HKCU 522;

(2) *Ng Shek Wai v. Hong Kong Institute Of Certified Public Accountants* [2021] HKCU 6184; and

(3) *Mathnasium Center Licensing, LLC v. Chang Chi Hung* [2021] 2 HKC 552; and

(d) the judgment of the HC of Singapore in *Lim Chee Huat v. PP* [2019] 5 SLR 433;

(ii) the learned HC Judge should not allow the accused's appeal solely on the ground that the SC's GD lacked any reasoning;

(iii) the HC was under a duty to review the evidence at the trial (evidence (trial)) and to determine if the SC's decision was supported by the evidence (trial);

(iv) with regard to the three rights (one trial + two appeals), the three Malaysian cases submitted by the accused's learned lead counsel and accepted by the learned JC, did not support the three rights (one trial + two appeals) as a ground to allow the accused's appeal;

(v) there was sufficient evidence (trial) beyond all reasonable doubt to support the accused's conviction in respect of the first charge; and

(vi) the sentence imposed by the learned SCJ was just and not manifestly excessive.

[13] In resisting this appeal, Datuk Gurdial Singh Nijar, learned lead counsel for the accused, had contended as follows, among others:

(i) the HC's decision was justified on "exceptional and peculiar circumstances" of this case. This was because there was "a flagrant miscarriage of justice" suffered by the accused;

(ii) the SC's decision was a "non-decision" because the learned SCJ "copy-pasted" and "plagiarised" the prosecution's written submissions in the SC's GD;

(iii) the accused's constitutional right to a fair trial in the SC under art. 5(1) of the Federal Constitution (FC) had been "effectively negated as the trial process (in the SC) was an absolute nullity". In this regard, the defence relied on the following cases:

(a) the Federal Court case of *Arulpragasan Sandaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1; and

(b) the judgment of the Federal Court in *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414;

(iv) as the SC's GD was a "complete reproduction" of the prosecution's written submissions, the SC's decision was a "non-direction" and a "misdirection" which warranted appellate intervention by the learned JC;

(v) the *verbatim* copying of the prosecution's written submissions in the SC's GD, showed that the learned SCJ did not conduct an independent judicial evaluation of the evidence (trial) and the submission of the accused;

(vi) the HC's decision could be justified by the following cases:

(a) cases decided in Malaysia, namely:

(1) *Dato' See Teow Chuan*;

(2) the Federal Court's judgment in *Ganapathy Rengasamy v. PP* [1998] 2 CLJ 1; [1998] 2 MLJ 577;

(3) the decision of the HC in *Balasingham v. PP* [1959] CLJU 8; [1959] 1 LNS 8; [1959] 1 MLJ 193;

(4) the CA case of *Deepanraj Subramanian v. PP* [2015] 3 CLJ 439;

(5) the decision of the Federal Court in *Sabah Development Bank Bhd v. Petron Oil (M) Sdn Bhd* [2020] 4 CLJ 811; [2023] 3 MLJ 600;

(6) the CA's judgment in *Rengarajan Thangavelu v. PP* [2015] 1 CLJ 993; and

(7) the decision of Nazlan Ghazali J (as he then was) in the HC in *Yue Chi Kin v. PP* [2020] 7 CLJ 224;

(b) two cases from Canada:

(1) the judgment of the British Columbia's CA in *Cojocaru (Guardian Ad Litem) v. British Columbia Women's Hospital And Health Centre & Anor* [2011] BCCA 192; and

(2) the decision of the CA of Ontario in *Sorger v. Bank Of Nova Scotia* 160 DLR (4th) 66;

(c) the judgment of the HC of Singapore in *Lim Chee Huat*; and

(d) two decisions of Hong Kong's Court of Final Appeal (its apex court), namely:

(1) *Nina Kung v. Wong Din Shin* [2005] HCCU 1254; and

(2) *Wong To Yick Wood Lock Ointment Ltd v. Singapore Medicine Co (A Firm) & Ors* [2023] 5 HKC 126;

(vii) with regard to the three rights (one trial + two appeals), the learned JC did not err in law by accepting the three Malaysian cases as submitted by the accused's learned counsel; and

(viii) the evidence (trial) raised a reasonable doubt regarding the guilt of the accused with respect to all of the three charges.

Issues

[14] This appeal raises the following questions:

(i) whether an appellate criminal court can set aside a trial court's decision solely on the grounds that the trial court's GD:

(a) copied *verbatim* the written submission of one party only (judicial copying);

(b) did not acknowledge the fact that the contents of the trial court's GD were based word for word on one party's written submission only (judicial plagiarism); and

(c) did not refer at all to the written submissions of the opposing party;

(d) did not identify the factual and legal issues which arose in the case;

(e) did not conduct any independent assessment of the evidence adduced at the trial;

(f) did not analyse the written and oral submissions of learned counsel for the prosecution and defence;

(g) did not contain any reason or reasoning for the trial court's decision (non-speaking GD); and

(h) showed that the trial judge had acted mechanically and did not apply his or her judicial mind to the case in question

(this judgment shall refer to all the matters referred to in the above sub-paras. (i)(a) to (h) as "errors/omission (trial court's GD)")

A without any consideration of the merits of the appeal. The above issue discusses:

(1) the judicial duties of the subordinate trial court and HC under the relevant provisions of the CPC; and

B (2) the HC's power to maintain a trial court's conviction and sentence pursuant to s. 422(a) of the CPC provided that there is no "failure of justice".

The errors/omission (trial court's GD) may occur in favour of the PP or an accused person (two scenarios). This judgment will discuss the effect of the C errors/omission (trial court's GD) in the two scenarios;

(ii) can the errors/omission (trial court's GD) *ipso facto* deprive the accused person of his or her constitutional right to a fair trial under art. 5(1) of the FC?; and

D (iii) whether written law and/or case law has provided that a breach of the three rights (one trial + two appeals) in itself allows the HC to allow an appeal against a trial court's decision.

Our Decision

Relevant CPC Provisions

E **[15]** We reproduce below ss. 173(f), (m), 180, 182A, 316 and 422 of the CPC:

s 173(f)(i) *When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a prima facie case against the accused.*

F (ii) *If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.*

…

(m)(i) *At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond* G *reasonable doubt.*

(ii) *If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it and the Court shall pass sentence according to law.*

H Provided that before the court passes sentence, the court shall, upon the request of the victim of the offence or the victim's family, call upon the victim or a member of the victim's family to make a statement on the impact of the offence on the victim or his family; and where the victim or a member of the victim's family is for any reason unable to attend the proceedings after being called by the court, the court may at its discretion admit a written I statement of the victim or a member of the victim's family.

(iii) *If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal*.

s 180(1) *When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.*

(2) *If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal*.

(3) *If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence*.

s 182A(1) *At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt*.

(2) *If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it*.

(3) *If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal*.

s 316 *At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may*:

(a) *in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law*;

(b) *in an appeal from a conviction or in an appeal as to sentence*:

(i) *reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or*

(ii) *alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;*

(c) *in an appeal from any other order, alter or reverse such order.*

s 422 Subject to the provisions contained in this Chapter *no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of*:

(a) *any error, omission* or irregularity *in the* complaint, sanction, consent, summons, warrant, charge, *judgment* or other proceedings before or during trial, or in any inquiry or other proceedings under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence,

unless such error, omission, irregularity, want, or improper admission or rejection of evidence *has occasioned a failure of justice*.

(emphasis added)

In this judgment, we shall refer to the above CPC provisions as the "relevant CPC provisions".

A **When Can A Court Acquit Or Convict An Accused Person?**

[16] Premised on the relevant CPC provisions, a criminal trial court, be it a subordinate court or HC, can only acquit an accused person in the following circumstances:

B (i) if the prosecution has failed to prove a *prima facie* case of the charge against an accused person at the end of prosecution case – please refer to ss. 173(f)(ii) (for a subordinate court) and 180(2) of the CPC (for HC). A *prima facie* case is only proven by the prosecution at the end of the prosecution case if the prosecution is able to prove the charge beyond all reasonable doubt – please refer to the judgment of Gopal Sri Ram JCA (as he then was) in the Federal Court case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457; [2005] 6 MLJ 393, at [4]; and

C

(ii) a lower court and HC can only acquit an accused person after the close of the defence case pursuant to ss. 173(m)(iii) and 182A(3) of the CPC, respectively, if the prosecution has failed to prove the charge beyond all reasonable doubt.

D

[17] According to ss. 173(m)(ii) and 182A(2) of the CPC, a subordinate court and HC can only convict an accused person after the close of the defence case if the prosecution can prove the charge beyond all reasonable doubt.

E

[18] In an appeal to the HC by either an accused person or the prosecution against a decision of a lower court, by virtue of s. 316(a) and (b) of the CPC:

(i) the HC can only affirm the subordinate court's conviction of an accused person if:

F

(a) there is proof beyond all reasonable doubt of the guilt of the accused person; and

(b) any breach of CPC, error and/or omission by the trial judge is curable under s. 422 of the CPC (on the grounds that there is no "failure of justice" to the accused person); or

G

(ii) an accused person can only be acquitted by the HC in either one of the following two scenarios:

(a) if the prosecution has failed to prove the charge against the accused person beyond all reasonable doubt; or

H

(b) if there is a breach of CPC, error and/or omission by the trial judge which has caused an injustice to the accused person and cannot be cured by s. 422 of the CPC.

I **[19]** As explained in the above paras. 16 to 18, by virtue of the relevant CPC provisions, a subordinate court and HC can only acquit and convict an accused person after considering the merits of the case in question.

Can An Appellate Court Reverse A Trial Court's Decision On Appeal Merely Because Of Errors/Omission (Trial Court's GD)?

[20] Firstly, civil cases decided in Malaysia and other jurisdictions, as submitted by both learned counsel for the PP and accused, do not apply in view of the application of the relevant CPC provisions in this case (please refer to the above paras. 15 to 19).

[21] Secondly, the CPC is a code of law which is intended by our Legislature to be comprehensive. If there is a *lacuna* in the CPC and other written law of this country regarding criminal procedure, s. 5 of the CPC allows the application of English law provided that such an application "shall not conflict or be inconsistent with (CPC) and can be made auxiliary" to the CPC. Section 5 of the CPC reads as follows:

> **Laws of England, when applicable**
>
> s. 5. *As regards matters of criminal procedure for which no special provision has been made by this Code or by any other law for the time being in force the law relating to criminal procedure for the time being in force in England shall be applied so far as the same shall not conflict or be inconsistent with this Code and can be made auxiliary thereto.*
>
> (emphasis added)

In *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544, at 548, Abdul Hamid Omar LP has delivered the following judgment of the Supreme Court:

> *Another relevant consideration is our [CPC] and its relationship with present English common law. The Criminal Procedure Code (Amendments and Extension) Act 1976, which came into force on 9 January 1976 is applicable to the whole of Malaysia, amending and codifying the previous separate legislations. The Code, as its name suggests was intended to be an exhaustive pronouncement of the criminal procedure. Section 5 [CPC] is indicative of the principles to be applied by local courts. This section provides for English law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or any other existing law. English law is applicable insofar as it does not 'conflict or be inconsistent with this Code and can be made auxiliary thereto.' The pronouncement and effect of the Code leave no lacuna under normal circumstances.*
>
> (emphasis added)

In view of the relevant CPC provisions, s. 5 of the CPC bars any application of English law in this appeal.

[22] Thirdly, Singapore's Criminal Procedure Code has provisions which are similar to the relevant CPC provisions. Hence, the judgment by Aedit Abdullah J in the Singapore HC case of *Lim Chee Huat* is persuasive and will be considered later in para. 27 of this judgment.

[23] With regard to the errors/omission (trial court's GD):

(i) the first rule of natural justice (first rule) requires all judges to be impartial and free from bias against any party:

(a) as a matter of fact; and

(b) as perceived objectively by a "fair-minded and informed observer" – please refer to the objective test of a "fair-minded and informed observer" as decided by Lord Hodge DPSC (concurred by Lord Reed, Lady Black, Lord Lloyd-Jones and Lady Arden) in the Supreme Court of the United Kingdom in *Halliburton Co v. Chubb Bermuda Insurance Ltd (Formerly Known As Ace Bermuda Insurance Ltd) & Ors (International Court Of Arbitration Of The International Chamber Of Commerce & Others Intervening)* [2020] 3 WLR 1474, at [52];

(ii) judicial copying gives rise to the perception by a "fair-minded and informed observer" that the trial court had not been independent and had been biased in favour of the party whose written submissions had been copied wholesale by the trial court against the other party. In other words, the first rule has been breached when there is judicial copying; and

(iii) judicial plagiarism:

(a) indicates intellectual dishonesty; and

(b) shows that the court has acted mechanically in making its decision without any independent assessment of the evidence and submissions of the parties.

[24] Notwithstanding the errors/omission (trial court's GD) which include:

(i) judicial copying;

(ii) breach of the first rule;

(iii) judicial plagiarism; and

(iv) non-speaking GD

we are of the considered view that the HC, as an appellate court, cannot decide an appeal solely on the errors/omission (trial court's GD) without considering the merits of the appeal. Our reasons are as follows:

(a) the HC, as an appellate court, has a judicial duty under s. 316 of the CPC to consider the merits of the appeal (HC's judicial duty (s. 316 of the CPC)). If otherwise, there would have been an abdication of the HC's judicial duty (s. 316 of the CPC). The HC's judicial duty (s. 316 of the CPC) entails the following judicial functions on the part of the HC in deciding an appeal against a subordinate court's decision after a trial:

(1) after the close of the prosecution case:

(1)(a) whether the lower court had erred in law and in fact in determining that the prosecution had failed to prove a *prima facie* case of the charge against the accused person pursuant to s. 173(f)(ii) of the CPC; and

(1)(b) had the subordinate court decided correctly in law and in fact that the prosecution had proven a *prima facie* case of the charge against the accused person under s. 173(f)(i) of the CPC?;

(2) after the close of the defence case:

(2)(a) whether the lower court had rightly acquitted in law and in fact the accused person of the charge pursuant to s. 173(m)(iii) of the CPC; and

(2)(b) did the subordinate court err in law and in fact in convicting an accused person of the charge within the meaning of s. 173(m)(ii) of the CPC? If this question is answered in the affirmative by the HC, the HC should then consider the legality and extent of the sentence imposed by the lower court on the accused person; and

(ii) the errors/omission (trial court's GD) constituted "errors" and/or "omission" in the judgment of the trial court as understood in s. 422(a) of the CPC. Hence, the HC is duty-bound as an appellate court to consider whether the errors/omission (trial court's GD) had caused a failure of justice in the case at hand (HC's judicial duty (s. 422(a) of the CPC)). Whether the errors/omission (trial court's GD) had occasioned a failure of justice requires the HC to consider the merits of the appeal;

(iii) the fulfilment of both the HC's judicial duty (s. 316 of the CPC) and HC's judicial duty (s. 422(a) of the CPC) (referred collectively in this judgment as the "HC's two judicial duties (appeals against subordinate court's decisions)") is essential in the administration of criminal justice. If otherwise, an accused person may be wrongly acquitted or erroneously convicted on an appeal to the HC against a lower court's decision. At this juncture, we rely on the following judgment of Lord Diplock in the House of Lords in *R v. Sang* [1980] AC 402, at 437:

> *… for the fairness of a trial according to law is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*
>
> (emphasis added)

A The above judgment in *Sang* has been approved by our Supreme Court in a judgment delivered by Mohd Azmi SCJ in *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243; [1986] 2 MLJ 33, at 38;

B (iv) an appeal to the HC against a subordinate court's decision after trial is a continuation of the trial by way of rehearing and despite the errors/omission (trial court's GD), the HC is duty-bound to consider the merits of the appeal; and

C (v) neither the prosecution nor an accused person should be penalised or faulted due to the errors/omission (trial court's GD). This is understandable because the preparation of a trial court's GD is solely within the judicial purview of the trial court, which should not be encroached upon by either the prosecution or defence.

[25] In view of the HC's two judicial duties (appeals against subordinate D court's decisions), notwithstanding the errors/omission (trial court's GD), the HC, as an appellate court, has the following judicial duties:

(i) to consider the merits of the appeal in accordance with the HC's judicial duty (s. 316 of the CPC) by:

E (a) perusing the evidence adduced at the trial in the lower court;

(b) considering the parties' written submissions; and

(c) listening to the oral submission of learned counsel; and

(ii) as required by the HC's judicial duty (s. 422(a) of the CPC), to decide F whether the errors/omission (trial court's GD) had caused a failure of justice in the case in question.

It is to be emphasised that the HC's two judicial duties (appeals against subordinate court's decisions) apply equally to both appeals by the PP and accused persons.

G **[26]** The view expressed in the above paras. 24 and 25 is supported by the following Malaysian cases:

(i) the following two judgments of the Federal Court:

(a) in *Ganapathy Rengasamy*, at pp. 6 to 9 (CLJ); pp. 585 and 588 H (MLJ), Shaik Daud JCA had delivered the 2-1 majority judgment of the Federal Court as follows:

> *First and foremost, we would like, with respect, to mention here that the grounds of judgment of the learned judge are far from satisfactory in that they do not convey a 'speaking' judgment although the importance of this* I *has been stressed in a number of decided cases. (See, for example, Balasingam v. PP [1959] MLJ 193 refd per Ismail Khan J (as he then was) and Murugiah v. PP [1941] MLJ 17 refd per Horne J). They consist substantially of reproduction of prosecution witnesses' testimonies*

in the form of questions and answers. The learned judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.

It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not just brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in Mat v. PP [1963] MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in Mohamad Radhi bin Yaakob v. PP [1991] 3 MLJ 169.

...

We find there are many material questions left unanswered by the prosecution in this case and coupled with the learned judge's failure to address material aspects of the defence's case, has, in our view, been a serious misdirection by way of non-direction. It is our considered finding that on the totality of the case, the appellant has rebutted the presumption under s. 37(d) of the Act, on a balance of probabilities. The appellant has established that even though he had custody and perhaps control of the bag and thereby had possession of it, at the time of his arrest, he had no knowledge whatsoever of its contents. The learned judge failed to give consideration to this aspect of the defence. We therefore allowed the appeal, quashed the conviction and set aside the sentence. We ordered the appellant to be acquitted and discharged.

(emphasis added)

According to the above majority judgment of the Federal Court, notwithstanding the trial HC's non-speaking written judgment, the majority judgment of the Federal Court had proceeded to consider the merits of the accused person's appeal to the Federal Court; and

(b) in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613, at pp. 818 to 819 (CLJ); 628 to 629 (MLJ), Zulkefli Makinudin FCJ (as he then was) had decided as follows:

As regards the first main ground of appeal raised by the appellant, I am of the view that the [CA] has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The [CA] is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the [CA] is free to determine whether or not the various findings of the trial court are correct (see Mohamed Mokhtar v. Public Prosecutor [1972] 1 MLJ 122). In the present case even though the [CA] took the view that the [HC] judgment

was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The [CA] had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the [CA's] decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the [CA] did not err on this issue.

(emphasis added)

(ii) the following trilogy of the CA's decisions:

(a) in *Mohd Nazri Ismail*, at [33] to [37], Aziah Ali JCA (as she then was) had given the following judgment:

[33] *Learned counsel submitted that the learned judge had failed to judicially appreciate the entire case because at the end of the prosecution case Her Ladyship had, in her grounds of judgment, adopted large parts of the written submissions of the prosecution (see p. 8 of learned counsel's written submissions). The learned DPP in his reply conceded that the learned judge had reproduced 20 pages out of 98 pages of the written submissions of the DPP in the court below. However, it is submitted that the learned judge did consider the submissions by both parties and having done so, agreed with the prosecution and adopted the written submissions of the prosecution. The learned DPP submitted that it is not wrong for the learned judge to reproduce parts of the written submissions of the prosecution when Her Ladyship agreed with the prosecution on any particular issue. It was further submitted that despite the shortcomings in the learned judge's grounds of judgment, the evidence adduced by the prosecution is strong and no appellate intervention is warranted*.

[34] *Whilst we agree with the position taken by the prosecution in relation to the manner the grounds of judgment was written in this case, we are not to be taken as condoning the act of copying written submissions. We are of the view that it is highly improper for a judge to copy the written submissions of counsel wholesale, and without acknowledging the source. In the present case, it is patently clear in the judgment of the learned judge that the written submissions had been copied wholesale without acknowledgment*.

[35] *We wish to refer to the case of Cojocaru v. British Columbia Women's Hospital and Health Centre [2013] 2 SCR 357. In that case, the main question in the appeal before the Supreme Court of Canada was whether a trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submissions. We respectfully adopt the views as expressed in the judgment of the Honourable Chief Justice wherein he said, inter alia, as follows*:

> *… It may not be the best practice for judges to bulk up their judgments with great swaths of borrowed material. But the fact remains that borrowed prose, attributed or otherwise, does not, without more, establish that the judge has failed to come to grips with the issues required to be decided*.

To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment-writing. The conventions surrounding many kinds of writing forbid plagiarism and copying without acknowledgment.

His Lordship said further:

To sum up, extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute sources do not in themselves rebut the presumption of judicial impartiality and integrity. This occurs only if the copying is of such a character that a reasonable person appraised of the circumstances would conclude that the judge did not put her mind to the evidence and the issues and did not render an impartial, independent decision.

Thus the Supreme Court concluded that while it is desirable that judges express their conclusions in their own words, incorporating substantial amounts of material from submissions or other legal sources into reasons for judgment does not, without more, permit the decision to be set aside. Only if the incorporation is such that a reasonable person would conclude that the judge did not put her mind to the issues and decide them independently and impartially as she was sworn to do, can the judgment be set aside.

[36] *In the present appeal, we have carefully scrutinised the grounds of judgment of the trial judge and we agree with the learned DPP that, notwithstanding the copious reproduction of the prosecution's submissions in the grounds of judgment, on the evidence adduced, the learned judge would have come to the same finding ie that the prosecution has established a prima facie case against the appellant. We find ample evidence to support the finding of the learned judge that the appellant had custody, control and mens rea possession of the drugs and in invoking the presumption under s. 37(da) of the Act. Thus on the totality of the evidence we find that the learned judge is correct to order the appellant to enter his defence. Having considered the defence and having re-examined the prosecution case, Her Ladyship found that the defence is an afterthought. We find no reason to disagree. Having perused the evidence we find that the defence had failed to rebut the presumption under s 37(da) of the Act. We find that the conviction is safe.*

[37] For the reasons stated above, we dismissed the appeal and affirmed the conviction and sentence.

(emphasis added)

(b) Balia Yusof Wahi JCA (as he then was) had decided as follows in *Deepanraj Subramanian*, at [61], [63] to [65], [67] and [68]:

[61] *Learned counsel for the appellant had labelled the judgment of the learned trial judge as a non-speaking and not a reasoned judgment. He submitted the said judgment is found to be lacking in the following issue*s:

A (i) failure to deal with the issue of credibility of SP4 and SP5;

(ii) failure to deal with the issue of whether SP4 and SP5 are interested witnesses;

(iii) failure to deal with the issue of incomplete investigation;

B (iv) absence of the analysis on the DNA evidence found on the knife;

(v) absence of his findings on the contradiction in the evidence of SP4 and SP5 in relation to the number of stabbings inflicted on the deceased.

C ...

[63] *Judgment writing is a matter of individual style and the need for a speaking judgment needs no emphasis. It is an elementary principle of fairness that parties must not only be given a fair opportunity of being heard, but also appraised of how and why a judge has reached his* D *decision. Section 308 of the CPC speaks of "grounds of decision" which means a reasoned judgment on the facts and the law and not merely the conclusion arrived at. What amounts to a speaking judgment varies from case to case. Mere regurgitation or narration of the facts and a statement of the law does not amount to a speaking judgment.*

E [64] *Shaikh Daud JCA sitting in the Federal Court in Ganapathy Rengasamy v. PP [1998] 2 CLJ 1; [1998] 2 CLJ 101; [1998] 2 MLJ 577 at p. 585 found the grounds of judgment of the learned judge far from satisfactory in that they do not convey a 'speaking' judgment. The judgment consists substantially of reproduction of the prosecution's witnesses' testimonies in the form of questions and answers. The learned* F *judge failed to analyse or assess these testimonies. He merely set them out and presumably accepted them without question. He has not set out the defence of the appellant with a view to assessing it, nor has he tested the defence by comparing it with the evidence adduced by the prosecution.*

[65] *We may agree with learned counsel that the judgment written by the learned trial judge would be 'complete' had the learned trial judge* G *dedicated his attention and make further comments on the nature of the evidence of both SP4 and SP5 instead of just merely glancing through their evidence very generally and in passing. A judgment need not necessarily be lengthy, however as in the instant case, where the evidence of both SP4 and SP5 stood in prominence, it is only reasonable to expect* H *that further deliberations be made and the conclusions drawn by the trial judge be made apparent in the judgment. The absence of such deliberation and reasoning will certainly open the judgment being criticised as non-speaking.*

...

I [67] *While we say that the written judgment prepared by the learned trial judge in this case may not be the best judgment, but in its totality we are satisfied that it meets the requirement of s. 308 of the CPC.*

[68] *We did a very close scrutiny of the judgment and we are of the view that the said judgment has the basic elements and ingredients of a speaking judgment although it may not be an ideal one, so to say. By way of comparison the said judgment 'speaks' far much more than the one referred to in Ganapathy Rengasamy (supra) and the eight lines judgment written by the judge in Rex v. Low Toh Cheng [1941] 1 MLJ 1.*

(emphasis added); and

(c) in *Chukwudi Okonkwo v. PP* [2018] CLJU 131; [2018] 1 LNS 131; [2018] MLJU 93, at [20] to [22], Ahmadi Asnawi JCA held as follows:

[20] *Learned counsel also took issue with the learned trial judge's failure to address the issues relating to the aforesaid discrepancies in his grounds of judgment although the same was raised in the appellant's submission at the close of the prosecution's case and was indeed acknowledged by the learned trial judge.*

[21] *We were in agreement with learned counsel that the learned trial judge did not address the issues relating to the said discrepancies although he had acknowledged in his grounds of judgment that the appellant had raised the said issues at the close of the prosecution's case* – see last para. p. 11, Jilid 1, RR.

[22] *However, we wish to reiterate that an appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical examination and come to its own findings even though in the grounds of judgment, the trial judge did not make any specific findings on the issues raised before him. In addition, in a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct – see Mohamed Mokhtar v. PP [1972] 1 MLJ 122.*

(emphasis added); and

(iii) the following three HC judgments (in chronological order):

(a) according to Ismail Khan J (as he then was) in *Balasingham*, at p. 194:

The trial Court is under a statutory obligation under section 308 [CPC] to transmit to the Appellate Court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a "speaking" judgment needs no emphasis. In fact in Murugiah v Public Prosecutor [1941] MLJ 17 and Public Prosecutor v Low Toh Seng [1941] MLJ 1 both Horn J. and Terrell Ag. C.J. felt that the absence of reasons indicates the possibility that such vital consideration as the weight of evidence and the possibilities of the case may not have influenced the mental process of the trial Judge in arriving at the ultimate finding. After all there is no legal presumption that an interested witness should not be

A believed. He is entitled to credence until cogent reasons for disbelief can be advanced in the light of evidence to the contrary and the surrounding circumstances.

I propose to deal very briefly with the last ground of appeal. P.W.1 Inspector Chong said in his evidence: "Wong told me that there was no need to give the $20. He said $5 would be sufficient which was the usual amount." Now this statement of P.W. 3 is one made in the course of investigation and its admission is clearly in contravention of section 113 of the Criminal Procedure Code. There is another serious illegality. P.W.3 was allowed to give evidence that appellant "caused trouble to others." This is evidence that appellant is a person likely to have committed the offence and is clearly irrelevant and inadmissible. It is true that the learned President does not refer to such evidence in his judgment but the possibility that it might have influenced his decision cannot be excluded.

I consider it unfair to the appellant having regard to the unsatisfactory nature of the prosecution evidence to put him to the peril of a retrial. Accordingly I allow the appeal. The conviction is quashed and the sentence set aside. The fine, if paid, must be refunded.

(emphasis added)

It is to be highlighted that in *Balasingham*, despite the fact that the SC's GD was a non-speaking one, the HC perused the evidence and acquitted the accused person after considering the merits of the accused person's appeal;

(b) Sharma J had delivered the following judgment in *Mohamed Mokhtar v. PP* [1971] CLJU 84; [1971] 1 LNS 84; [1972] 1 MLJ 122, at 123:

It has been said there are no findings of fact and that the learned president has not given his reasons. It is undoubtedly desirable that the learned magistrates and the learned presidents should when writing their grounds of decision give their findings and the reasons for those findings. It has been suggested that it is mandatory on the part of the learned magistrates and the learned presidents to give such reasons. I have in one of the appeals held it to be so but it is not mandatory in the sense that failure to give such reasons would render the conviction void or turn the trial itself into a nullity. Sometimes the amount of work the magistrates have to cope with at a particular time may make it virtually impossible for them to write a well-dressed judgment, flawless as it were, for the benefit of the appellant's counsel. There may, of course, be cases where because reasons are not given it may become difficult for the appellate court to come to its own findings and where because of the lack of such reasons there may be a likelihood of injustice being caused to the accused. In such cases the appellate court can always order a retrial. I do not think this appeal could be allowed on that sole ground as suggested by the learned counsel for the appellant. It is not a case which calls for a retrial or where any court could have any doubt as to the guilt of the appellant. When the appellate Court is convinced, as I am in this case, that the conviction of the appellant was good and there is nothing to cast any shadow of doubt in the finding of guilt arrived at by the learned magistrate

or the president, the court itself can deal with the matter as fully and as effectively even though the grounds of decision as appearing in the appeal record are found lacking in specific findings and the reasons for those findings. I cannot now ask the learned president to write out fresh grounds of decision to meet with the criticism levelled by the learned counsel for the appellant.

The only question which I have to consider is whether the defence put up by the appellant could reasonably be true. As I have already found and held that he had accepted money and that the money had come through and from the hands of P.W.12, the defence put up by him is nothing but extremely flimsy and totally unbelievable. It is one of the cases where the appellant had prepared P.W.12 to make the payment and this preparation had been going on sufficiently in time prior to the acceptance of that money by him.

(emphasis added); and

(c) in *Yue Chi Kin*, at [142], [143], [146], [150] to [155], [185] and [187] to [189], Nazlan Ghazali J (as he then was) held as follows:

[142] *The one other problem with the judgment of the [SC], as recorded in its grounds of judgment is that it is a non-speaking judgment. In the case of Ganapathy Rengasamy v. PP [1998] 2 CLJ 1; [1998] 2 MLJ 577 the Federal Court instructively held as follows:*

…

[143] *The key complaint is that the judgment substantially followed the written submissions of the respondent.*

…

[146] *However, the emphasis by the respondent is that notwithstanding the disagreement on the approach, the fact that the grounds of judgment were a mere reproduction of the prosecution's submission cannot be a sole ground to quash the conviction where the case against the accused, like the appellant presently, had been proven beyond reasonable doubt. On this, the [CA] in Mohd Nazri Ismail v. PP (supra) said*:

…

[150] *In my judgment, having scrutinised the grounds of judgment of the [SC] convicting and sentencing the appellant, the contention that the judgment of the [SC] is not a speaking judgment is far from lacking in merit. There is on the contrary much substance in this assertion. It plainly is not a speaking judgment. It lifted very many parts of the submissions of the respondent*.

[151] *It is readily obvious that having read the written submissions as incorporated in the record of appeal, the grounds of judgment of the [SC] was essentially, as asserted by the appellant, a cut and paste decision, adopting primarily the written submissions made by the prosecution at the end of its case, or again as validly stated by the appellant, a close replica of the submissions. It is not easy to find any parts of the judgment which were not actually copied from the prosecution's submission. The [SC] clearly had written its findings on that basis*.

A

[152] *The underlying concern is that the grounds of judgment contain extremely little analysis of the evidence. There is no meaningful mention of the facts and evidence of the accused in the grounds of judgment, not to mention the salient aspects that the [SC] considered as warranting attention, and this immediately raises the concern that the findings were made by the [SC] not on the basis of the evidence, but on the prosecution's submissions instead. There was in other words insufficient if not total absent of any judicial assessment of the facts and evidence of the case*.

B

[153] *This situation in my view justifies appellate intervention. Reliance by the respondent on Mohd Nazri Ismail v. PP does not assist its position. This is not a question about non-attribution of sources or about lack of originality. It is about insufficient judicial appreciation of the facts and evidence resulting in a non-independent judgment. In fact the [CA] in Mohd Nazri Ismail v. PP clearly said*:

C

…

[154] Not only is there little analysis of the evidence. There is also a blatant reference to a section of the applicable legislation which was entirely irrelevant to the case. This further suggests that to that little extent that the [SC] attempted to inject some form of independent analysis it got the law wholly wrong, implying its failure to appreciate the facts and evidence of the case to start with.

D

E

[155] A patent lack of the appreciation of the evidence and of the defence is often a ground for appellate intervention, as made clear by the case law outlined earlier in this judgment. A clear example of the non-appreciation of the facts and evidence by the [SC] was its judgment's express reference to the application of s. 122(1) of the SIA and the need for the appellant to rebut or disprove the presumption enacted therein when s. 122(1) is actually totally irrelevant to the proceedings, because, as stated earlier, an auditor simply cannot come within the remit of s. 122(1) which deemed only the directors and officers of a company to be committing an offence whenever the company is *guilty of such an offence. An auditor is clearly neither.*

F

…

G

[185] Accordingly, I reiterate that even though I agree that the authorities have held that an appeal is a re-hearing, and that an appeal court may subject the evidence to a critical examination and come to its own findings, in this case, such examination, as I have undertaken, could not in my view assist the case of the prosecution.

H

…

Conclusion

[187] In view of the foregoing reasons, I find that the conviction and sentence against the appellant cannot be sustained. The charge was defective for the failure to include a key ingredient of the offence under s. 122B of the SIA, and for the absence of evidence of knowledge on the part of the directors, save for DW2, rendering a charge of abetment against the appellant untenable.

I

[188] In addition, the non-speaking judgment of the [SC] contained very little judicial analysis, and revealed considerable failure to appreciate the facts, evidence and the applicable law, which even on the basis of a re-hearing could not result in a finding of a conviction which is ruled to be safe. All this more than justifies appellate intervention.

[189] It follows that it cannot be said that the charge against the appellant had been proven beyond reasonable doubt. The conviction and the sentence against the appellant therefore cannot be sustained and must be set aside. The appeal is allowed, and the appellant be acquitted and discharged from the charge.

(emphasis added)

It is clear from *Yue Chi Kin* that despite the fact that there was judicial copying in the SC's GD and the SC's GD was a non-speaking judgment, the HC had undertaken a detailed examination of the merits of the accused person's appeal and consequently, the accused person was acquitted of the charge in that case.

[27] Our view is fortified by the following judgment in *Lim Chee Huat*, at [51] to [59]:

[51] *In the present case, the District Judge must have either extensively typed out the prosecution's closing submissions or had someone else do so, which would have been an utter waste of time and effort; or he must have cut and pasted the submissions into his judgment. Either raises the questions of whether any consideration was given to the Defence's arguments and if the District Judge properly weighed the strength of the parties' submissions*.

[52] *Considering the extent of the copying of the prosecution's submissions in the District Judge's GD, which included a typographical error present in the submissions, and the absence of any part in the GD indicating an assessment of the submissions from both sides, particularly any weighing of one side against the other, I do not find that the District Judge here was shown to have exercised his mind on the matters before him. This was not merely an error of the exercise of judgment but a judgment in name only that was not the exercise of any consideration and weighing. Importantly, the operative part of the GD substantially reproduced the prosecution's submissions, including the structure and content of the sections on the weight to be given to the Defence witnesses' testimonies (GD at [26] to [34]) and whether the appellant's defence that he had purchased capsules from a sinseh was to be believed (GD at [44] to [58]). There was no assessment or sifting of the arguments made, or consideration of the arguments on the other side that would have been put in by the Defence. The matters in the judgment which were not in the prosecution's submissions, such as the failure to call the sinseh as a Defence witness, were peripheral and did not lessen the effect of the substantial copying and unprocessed adoption of those submissions*.

[53] *I acknowledge that the conclusion which I have reached here differs from those reached in the other cases on copying discussed above. This reflects that judicial copying occurs as a matter of degree and that the copying that took place here was substantial and significant*.

[54] *The reasons for the District Judge, who is neither a new nor a junior judge, copying so substantially are not before me. Pressures of work are not a sufficient reason. While judging is certainly not the sinecure that some may think it is, all jobs these days are stressful and demanding. The usual bane of first instance judges, namely, the worry about being overruled, could not have been a factor in the present case either: one would have thought that adopting one side's arguments wholly and without discussion and weighing would raise an immediate red flag obvious to anyone. A trial judge needs to consider the arguments, weigh them and decide. Often, in written form, to make it comprehensible to the reader, the evidence and submissions need to be summarised and sometimes recounted at some length. But all of these are only the prelude to the meat of the judgment, namely, the determination of the issues. On scrutiny, judgments may be found inadequate or insufficient in that determination: that is simply part of the appellate process. Many trial judgments are found inadequate by the appellate court. It is our role as trial judges, both at the State Courts and the High Court, to learn from the guidance of the appellate court and strive to do better the next time. Here, however, the judgment was not merely insufficient. Here, the exercise of judgment was entirely absent. Here, the judge, at least as can be seen from his written judgment, did not judge at all.*

[55] *I was thus satisfied that there is reason to conclude that the District Judge failed to fully appreciate the material that was before him.*

[56] *As it could not be said that the GD was the product of the District Judge's exercise of judgment, it could not be given the deference usually accorded to first instance findings. However, acquittal does not follow simply from this finding. Nor did the appellant argue for this. In an appeal from a conviction, the choice lies between (a) an order for retrial or remittal to the trial court; or (b) disposal by this court: see s. 390(1)(b) of the CPC. In AOF v. PP [2012] 3 SLR 34 ("AOF"), the Court of Appeal considered the law in relation to acquittal, retrial and remittance to the trial judge, and classified categories of cases according to two extremes (at [277] and [296] to [298])*:

(a) *At one extreme, where the evidence adduced at the original trial was insufficient to justify a conviction, an acquittal and not a retrial should be granted save in exceptional circumstances.*

(b) *At the other end of the extreme, where the evidence against the appellant at the original trial was so strong that a conviction would have resulted, the prima facie appropriate course is to dismiss the appeal and affirm the conviction.*

(c) *Cases that fall between the two extremes include the following non-exhaustive situations: where critical evidence is no longer available; where the fairness of the trial below is compromised by the trial judge's conduct; or where the length of time before the putative retrial is disproportionate to the appellant's sentence or ongoing period of incarceration. The appellate court is to weigh the following non-exhaustive factors to determine if a retrial should be ordered: the seriousness and prevalence of the offence; the expense and length of time required for a fresh hearing; the extent to which a fresh trial will be an ordeal for the defendant; and whether the evidence that would have supported the appellant at the original trial would still be available.*

[57] *Remittal should only be ordered in limited circumstances, eg, where the trial court is to consider new material and reach a final decision having regard to findings hitherto made at the original trial (see the comments made in AOF at [302]), or where there is some material procedural irregularity that requires the conviction to be quashed, the sentence set aside, and the case remitted for a fresh plea to be taken (PP v. Sinsar Trading Pte Ltd [2004] 3 SLR(R) 240 at [37]). This is not the case here, as there is enough evidence for the appellate court to make a decision.*

[58] *Neither was this a case that required a retrial. To my mind, the evidence here did not turn on the assessment of the demeanour of the witnesses. Given the nature of the Defence's case, the focus of the court's assessment of evidence in this case should be on the internal and external consistency and the inherent probabilities of the appellant's defence.*

[59] *In the circumstances, I am satisfied that this court is in a position to weigh the evidence recorded and to determine the outcome of the present appeal. Intervention by an appellate court in respect of findings of fact and the exercise of discretion generally occurs only in limited circumstances, for instance, where the sentencing judge erred in failing to correctly appreciate the material that is before him: Yap Ah Lai ([26] supra) at [58], citing PP v. UI [2008] 4 SLR(R) 500 at [12]. An appellate court should be slow to overturn the trial judge's findings of fact; it is in a less advantageous position as compared to the trial judge who has had the benefit of hearing the evidence of the witnesses in full and observing their demeanour. But, conversely, an appellate judge is as competent as any trial judge to draw any necessary inferences of fact from the circumstances of the case where the actual findings have been ascertained: Yap Giau Beng Terence v. PP [1998] 2 SLR(R) 855 at [24].*

(emphasis added)

[28] We have not overlooked learned lead defence counsel's reliance on the CA's judgment in *Rengarajan Thangavelu*. In *Rengarajan Thangavelu*, at [5], [6] and [13] to [16], Hamid Sultan Abu Backer JCA had expounded as follows:

[5] *We will deal in the later part of the judgment, the jurisprudence relating to how an appellate court have to deal with the issue when* there are no grounds of judgment *or no sufficient grounds of judgment and/or no speaking judgment.*

[6] *What is essential to note is that the appellate court in a criminal trial as a general rule is not concerned whether the grounds of judgment is correct or wrong but only whether the judgment is safe.* (See *Mohd Johi Said & Anor v. PP* [2005] 1 CLJ 389). If there is no grounds of judgment but only a decision has been delivered, it will be caught by s. 308 [CPC] and art. 5 [FC] to earn an acquittal or an order of retrial. This is so because there is a mandatory requirement under the law in criminal cases for grounds of decision to be delivered. Not providing grounds of judgment is a serious matter. If a Magistrate or Sessions Judge does not provide grounds of judgment within a reasonable time and/or upon the direction of the [HC], then it will be a good ground for the dismissal of service of the Magistrate or Sessions' Judge itself. If a [HC] Judge does not provide grounds, it will be a good ground for sanction under the code of ethics and/or removal of the judge pursuant to the procedure set out in the [FC]. Failing to write grounds of judgment and only delivering a decision is a serious matter

A and inimical to the law and [FC]. The trial court must always place at least a brief ground at the time the decision is pronounced, to *prima facie* satisfy the requirement set out in s. 308 [CPC] which reads as follows:

...

B [13] We do not find any merit at all in ground (i) and (ii) of the complaint above. As to the ground (iii) in relation to there being no grounds of judgment, we have in the earlier part of the judgment dealt partly in respect of the jurisprudence relating to 'no grounds of judgment'. In the case of *Pembinaan Majujaya & 2 Ors v. Lau Tiong Ik Construction Sdn Bhd* [2008] 1 LNS 29, Hamid Sultan JC (as he then was) has documented all the relevant cases in respect of 'no grounds', 'no sufficient grounds' and/ C or 'no speaking judgment' and had considered the Malaysian, Indian and English cases. We do not wish to repeat save to say that the instant case is not one where there is no ground at all. If there is no ground at all it will be in breach of s. 308 [CPC]. If there is a breach of s. 308, a conviction cannot be sustained at all as it will breach art. 5 [FC] which D says:

…

[14] In such a case, the court will be duty bound to consider an acquittal or send it back for retrial as the conviction on the face of the record will be illegal. (See *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance* E *Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393). *In the instant case and on the facts of the case, there is no statutory breach. Our reasons inter alia are as follows*:

(i) *The learned judge has given brief grounds to satisfy s. 308*;

(ii) *On the facts and the law in respect of the instant case the grounds is self speaking. …*

F

…

[15] When the threshold of s. 308 is satisfied, the appellate court cannot order an acquittal but can order a retrial but the judgment can only be set aside after the court is satisfied that it is not safe to convict. (See *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381). To do so, the court must follow G the provision as set out in s. 60(1) of Courts of Judicature 1964 which reads as follows:

…

[16] *We have gone through the notes of evidence in detail. We are satisfied that no* H *substantial miscarriage of justice has occurred and it is safe to convict. For reasons stated above, the appeal is dismissed*.

(emphasis added)

We are of the opinion that the learned HC Judge had given brief grounds in *Rengarajan Thangavelu* regarding the accused person's conviction of the I charge in question. As such, we are unable to see how *Rengarajan Thangavelu* can be invoked by learned lead defence counsel to oppose this appeal.

[29] As explained in the above paras. 24 to 27, the learned JC did not fulfil the HC's two judicial duties (appeals against subordinate court's decisions) when the HC acquitted and discharged the accused of the three charges solely due to the errors/omission (trial court's GD). This is an error of law on the part of the HC, which warrants appellate intervention by this court (first legal error).

Was Accused Deprived Of Constitutional Right To A Fair Trial?

[30] Article 5(1) of the FC provides as follows:

> **No person shall be deprived of his life or personal liberty save in accordance with law.**
>
> (emphasis added)

[31] In *Yahya Hussein Mohsen Abdulrab*, at [32] to [38], Tengku Maimun Tuan Mat CJ had delivered the following judgment of Federal Court:

> [32] *It is beyond argument that art. 5(1) [FC] fundamentally guarantees the right to a fair trial. This is encompassed in the words "save in accordance with law". In other words, it is only through the process of law that a person may be deprived of his life or personal liberty*.
>
> [33] *That art. 5(1) guarantees the right to a fair trial is etched into our case law. See for example the two judgments of this court in Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265; [2010] 2 MLJ 312, at para. [49] and PP v. Gan Boon Aun [2017] 4 CLJ 41; [2017] 3 MLJ 12, at para. [13]*.
>
> [34] *There is another important case which bears mention, that is, the judgment of the High Court in PP v. Choo Chuan Wang [1992] 2 CLJ 1242; [1992] 3 CLJ (Rep) 329. Not only does the case unequivocally state that art. 5(1) [FC] recognises the right to a fair trial, but it also explains the general effect of the breach of that right as follows, at p. 333 per Edgar Joseph Jr J*:
>
> > *In the circumstances, applying a generous interpretation and avoiding the "austerity of tabulated legalism", I would respectfully agree with the decisions of the Indian Supreme Court and hold that art. 5(1) [FC] does imply in favour of an accused person the right to a fair hearing within a reasonable time by an impartial Court established by law. It follows that if an accused person can establish a breach of this right then, in the words of Sandhawalia, CJ in Madheshwardhari Singh v. The State (ibid), he would be entitled to an unconditional release and the charges levelled against him would fall to the ground*.
>
> [35] *In Lee Kwan Woh v. PP [2009] 5 CLJ 631; [2009] 5 MLJ 301, this court stated thus*:
>
> > *[18] Drawing the threads together, it is clear from the authorities that it is a fundamental right guaranteed by art. 5(1) that a person's life (in its widest sense) or his or her personal liberty (in its widest sense) may not be deprived save in accordance with state action that is fair both in point of procedure and substance. Whether an impugned state action is substantively or procedurally fair must depend on the fact pattern of each case. However, when the principle is applied to a criminal case, what it means is that an*

A *accused has a constitutionally guaranteed right to receive a fair trial by an impartial tribunal and to have a just decision on the facts. If there is an infraction of any of these rights, the accused is entitled to an acquittal. Whether there has been a fair trial by an impartial tribunal or a just decision depends on the facts of each case. While upon the subject under discussion we would refer with approval to the judgment of Edgar Joseph Jr J (as he*
B *then was) in Public Prosecutor v. Choo Chuan Wang [1992] 2 CLJ 1242, where he held that:*

...

C [36] *The above passage although relates to hearings before a fair and impartial tribunal is capable of a wide enough construction to refer to the consequence of a breach of the right of fair trial in the context of a criminal case. The principle in the passage cited is that where an accused person is denied his right to a fair trial, the result of that breach warrants an acquittal and discharge.*

D [37] *And in Shamim Reza (supra), this court has emphatically recognised that the right to be represented by competent counsel is a crucial aspect of the right to a fair trial. While on the facts of that case this court found that the counsel was incompetent, he was not flagrantly incompetent to the extent that the conviction was bad in law. This court however was quick to point out at para. [5] that what constitutes an "extreme case" or "flagrant incompetency" remains to be decided on the facts of each case.*

E [38] *The same point was considered in Mohd Hanafi Safii v. PP [2012] 1 LNS 814; [2013] 5 MLJ 87 where the Court of Appeal arrived at the same conclusion as Shamim Reza.*

(emphasis added)

[32] Firstly, *Yahya Hussein Mohsen Abdulrab* concerned an accused person's
F deprivation of his constitutional right to a fair trial under art. 5(1) of the FC because of the "flagrant incompetence" of the accused person's trial defence counsel. In *Yahya Hussein Mohsen Abdulrab*, the Federal Court did not discuss the issue of the effect of the errors/omission (trial court's GD).

[33] Secondly, the two Federal Court judgments in *Ganapathy Rengasamy*
G and *Ahmad Najib Aris* have decided on the effect of a non-speaking judgment. Until the Federal Court's decisions in *Ganapathy Rengasamy* and *Ahmad Najib Aris* have been overruled by the Federal Court, from the viewpoint of the doctrine of *stare decisis*, the CA, HC and all lower courts are bound by *Ganapathy Rengasamy* and *Ahmad Najib Aris*.

H **Whether Written Law And/Or Case Law Has Provided For Consequences Of A Breach Of three Rights (1 Trial + 2 Appeals)**

[34] Our FC, Courts of Judicature Act 1964 (CJA) and CPC do not provide, either expressly or by necessary implication, that a breach of the
I three rights (one trial + two appeals) *ipso facto* entitles an accused person to be acquitted and discharged of a criminal charge. On the contrary, as explained in the above paras. 24 to 27, despite the errors/omission (trial

court's GD), by virtue of the HC's two judicial duties (appeals against subordinate court's decisions), it is incumbent on the learned JC in this case to consider the merits (accused's appeal).

[35] We will now consider whether the following three cases have decided that a mere breach of the three rights (one trial + two appeals) could justify the learned JC to acquit the accused of the three charges:

(i) the judgment of Mohtar Abdullah FCJ in the Federal Court in *Megat Najmuddin*;

(ii) the HC case of *Aik Lee Feedmill*; and

(iii) the judgment of Hashim Yusoff FCJ in the Federal Court case of *Letchumanan Suppiah*.

[36] Firstly, as explained in the above para. 20, in view of the applicability of the relevant CPC provisions in this appeal, civil cases, such as *Megat Najmuddin* and *Aik Lee Feedmill*, cannot be referred to, either in support of this appeal or otherwise.

[37] In *Megat Najmuddin*, at p. 693 (CLJ); p. 429 (MLJ), Mohtar Abdullah FCJ had decided as follows:

> *The [CA] is created to confer any litigant dissatisfied with the decision of the trial judge in the [HC] the constitutional right of appeal to an intermediate appellate body (the CA) and thence to the final appellate body (the Federal Court). Article 121(2)(a) [FC] clearly confers on the Federal Court the 'jurisdiction to determine appeals from decisions of the [CA], of the [HC] or a judge thereof', qualified by art 128(3) [FC] that such jurisdiction shall be as provided by federal law. Article 128(3) [FC] is the enabling provision in the [FC] that allows federal law to regulate the exercise of the jurisdiction of the Federal Court conferred on it by art. 121(2)(a) [FC], ie, to allow federal law to be made to provide for rules, procedure or conditions (including the question of leave, etc) to ensure the proper exercise of the Federal Court's jurisdiction. Article 128(3) [FC] cannot be interpreted as allowing federal law to fetter the jurisdiction of the Federal Court to hear any appeal on the merits from the [CA] emanating from a decision of the [HC] or a judge thereof. A harmonious interpretation of art 128(3) vis-a-vis art 121(2)(a) [FC], will promote the purpose or object of the law providing for a three tiered pyramidal judicial system of 'one trial + two appeals' as envisaged in the [FC] and structured accordingly in the CJA.*
> (emphasis added)

[38] We cannot accede to the contention by learned lead counsel for the accused that the above judgment of Mohtar Abdullah FCJ in *Megat Najmuddin*, supports the proposition that a mere breach of the three rights (one trial + two appeals) entitled the learned JC to acquit the accused of the three charges without any consideration of the merits (accused's appeal). This decision is premised on the following reasons:

(i) *Megat Najmuddin* did not concern the effect of the errors/omission (trial court's GD). With regard to the effect of the errors/omission (trial

court's GD), we are bound by the two Federal Court judgments in *Ganapathy Rengasamy* and *Ahmad Najib Aris* – please refer to the above paras. 24 to 27 and 33;

(ii) as stated by Steve Shim CJ (Sabah and Sarawak) in *Megat Najmuddin*, at p. 657 (CLJ); p. 396 (MLJ), the Federal Court granted leave for the following two questions of law to be answered by the Federal Court in *Megat Najmuddin* (two legal questions (*Megat Najmuddin*)):

> This is an appeal against the decision of the [CA] given on 20 September 2000. *Leave to appeal to the Federal Court was granted to the appellant on 17 April 2001 on the following questions*:
>
> (i) *whether the Federal Court has jurisdiction to determine appeals from any judgment, order or decision of the [CA] which did not originate from the [HC], save and except from any judgment, order or decision which is whether the [CA] should or should not grant leave to appeal to it*;
>
> (ii) *whether the appellant, who is entitled to appeal to the [CA] has complied with r. 18(4)(d) and (7) of the Rules of the Court of Appeal 1994 ('the RCA') when he tendered a sealed copy of the order appealed from before the hearing of the appeal in the [CA] in compliance with the Supreme Court Practice Direction No 1 of 1992.*
>
> (emphasis added)

The 3-1 majority decision of the Federal Court in *Megat Najmuddin* on the two legal questions (*Megat Najmuddin*) formed the *ratio decidendi* of that case. Accordingly, the above *dicta* of Mohtar Abdullah FCJ (who was in the 3-1 majority *coram*) in *Megat Najmuddin*, is purely *obiter* and has no binding effect from the viewpoint of the *stare decisis* doctrine; and

(iii) the above *obiter dicta* of Mohtar Abdullah FCJ was not shared by the other two judges who were in the majority coram in *Megat Najmuddin*, namely, Steve Shim CJ (Sabah and Sarawak) and Abdul Malek Ahmad FCJ (as he then was).

[39] It is to be noted that the material facts in *Aik Lee Feedmill*, at pp. 530 to 531, are as follows:

(i) the plaintiff bank applied to the HC's Senior Assistant Registrar (SAR) for summary judgment against the defendant under O. 14 of the then applicable Rules of the High Court 1980 (RHC);

(ii) on the hearing date of the summary judgment application, neither the defendant nor its counsel was present. Hence, the learned SAR entered judgment in default of appearance against the defendant in favour of the plaintiff (default judgment);

(iii) the defendant appealed to the HC Judge against the default judgment (defendant's appeal);

(iv) the plaintiff raised a preliminary objection against the defendant's appeal on the grounds that the defendant should have applied to the SAR to set aside the default judgment under O. 14 r. 11 of the RHC (PO); and

(v) Suriyadi bin Halim Omar J (as he then was) upheld the PO on, among others, the following ground, at pp. 5 to 6 (CLJ); p. 533 (MLJ):

> *Apart from the above reasoning, I was also in total agreement with the respondent's view that by so skipping O. 14 r. 11, her client's interest was prejudiced. This was so, as the approach of the appellant reduced the respondent's statutory entitlement of a minimum of three appeals, to that of two. For clarification, if an aggrieved party submits a setting aside application, the matter for obvious reasons, will revert back to the same senior assistant registrar, who will review her decision. In that circumstance, it is not a question of an adjudicator rehearing a case heard much earlier, but to permit the absented party an opportunity to explain satisfactorily his absence, and thereafter adjudge whether to set side or not that order. No question of infringement of jurisdiction will arise here (Re St Nazaire Co (1879) 12 Ch D 88; Hession v. Jones [1914] 2 KB 421). In the event that default judgment is not set aside, the losing party of the application may then file the first-tier appeal to the [HC], followed by a second opportunity before the [CA], and eventually the Federal Court. By this mode of action, numerically the aggrieved party therefore has a right to a three-tier appeal. If the matter were to be heard at its inception as an appeal before the [HC], then the chagrined party, assuming that it is the respondent, will be left only with two tiers of appeal, viz the [CA] and the Federal Court. On that interpretation, the respondent's statutory interest or right of appeal, must be construed as having been prejudiced.*
>
> (emphasis added)

In *Aik Lee Feedmill*, the HC Judge upheld the PO and struck out the defendant's appeal. In view of the above facts and decision in *Aik Lee Feedmill,* we are unable to see how the accused can rely on *Aik Lee Feedmill* to resist this appeal.

[40] In *Letchumanan Suppiah*, at p. 601:

(i) the HC Judge acquitted the accused person of a charge of trafficking in dangerous drugs without calling for his defence (HC's acquittal);

(ii) on appeal by the PP, the CA ordered the accused person to enter his defence for a less serious offence of possession of dangerous drugs (CA's decision);

(iii) the PP appealed to the Federal Court against the CA's decision and applied for an order for the defence of the accused person to be called for the charge of trafficking in dangerous drugs (PP's appeal);

(iv) the accused person appealed to the Federal Court against the CA's decision on the grounds that the HC's acquittal was correct (accused person's appeal); and

(v) the Federal Court allowed the PP's appeal but refused the accused person's appeal. Hashim Yusoff FCJ decided as follows, at p. 661 (CLJ); p. 604 (MLJ):

> *It is also my considered view that the respondent is not prejudiced if this court were to allow the [PP's Appeal] at this stage of the trial by reversing the [CA's Decision] and calling upon the respondent to make his defence on the original trafficking charge because he would still have the right and the chance to raise a reasonable doubt in the prosecution case. Even if he were to be found guilty and then convicted on the trafficking charges, the respondent would still have his right to appeal to the [CA] and further to the Federal Court. The respondent would still not be deprived of the right provided by the law for the two tiers of appeal (see Megat Najumuddin bin Dato Seri (Dr) Megat Khas v. Bank Bumiputera (M) Bhd [2002] 1 MLJ 385 at p 429).*
>
> (emphasis added)

Letchumanan Suppiah did not concern the effect of the errors/omission (trial court's GD). At the risk of repetition, the two Federal Court judgments in *Ganapathy Rengasamy* and *Ahmad Najib Aris* apply in respect of the effect of the errors/omission (trial court's GD) – please refer to the above paras. 24 to 27 and 33. Finally, as explained in the above para. 38, the *obiter dicta* of Mohtar Abdullah FCJ in *Megat Najmuddin* cannot apply in this appeal.

[41] In view of our reasons stated in the above paras. 34, 36 and 38 to 40, we unhesitatingly find that the learned JC had committed a second appealable error of law in relying on a purported breach of the three rights (one trial + two appeals) to allow the accused's appeal and to deliver the HC's decision as he did (second legal error).

Outcome Of This Appeal

[42] Section 60(1) of the CJA provides as follows:

> s 60. **Powers of [Court of Appeal]**
>
> (1) **At the hearing of an appeal** the [Court of Appeal] shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and **the [Court of Appeal] may thereupon** confirm, reverse or **vary the decision of the [High Court]**, or may order a retrial or may remit the matter with the opinion of the [Court of Appeal] thereon to the trial court, or **may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised**:
>
> Provided that the [Court of Appeal] may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
>
> (emphasis added)

[43] In view of the first and second legal errors, we consider the following two options available to us under s. 60(1) of the CJA:

(i) we may peruse the evidence (trial), consider all the written submissions of the parties (we have previously heard the oral submission of learned counsel for both the PP and accused) and consider afresh the merits of this appeal (first option); or

(ii) vary the HC's decision with regard to the first charge and remit the accused's appeal to be heard by another judge/Judicial Commissioner (J/JC) on the first charge only (second option).

[44] We have decided to exercise our discretion under s. 60(1) of the CJA to invoke the second option because it is only just for another J/JC to consider afresh the accused's appeal in respect of the first charge on its own merits.

[45] Premised on the above reasons, this appeal is allowed with the following order:

(i) the HC's decision is varied to the extent that the accused's acquittal and discharge for the first charge is set aside;

(ii) part of the SC's decision with regard to the accused's conviction and sentence for the first charge (accused's conviction and sentence by SC (first charge)), is restored;

(iii) the accused's appeal in respect of the accused's conviction and sentence by SC (first charge) is remitted to the High Court to be heard before another J/JC (HC's rehearing (accused's conviction and sentence (first charge))); and

(iv) pending the disposal of HC's rehearing (accused's conviction and sentence (first charge)):

(a) there shall be a stay of execution of the five years imprisonment and payment of fine for the accused's conviction of the first charge; and

(b) the accused shall be released on bail on the same conditions granted by the HC pending the disposal of the accused's appeal.